

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2011 IL App (4th) 100577-U

Filed 9/15/11

NO. 4-10-0577

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
CHARLES R. ROBINSON IV,	)	No. 88CF182
Defendant-Appellant.	)	
	)	Honorable
	)	John W. Belz,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.  
Presiding Justice Knecht and Justice Turner concurred in the judgment.

**ORDER**

¶ 1 *Held*: OSAD’s motion to withdraw as counsel is granted where no colorable argument can be made the trial court erred in denying defendant's section 2-1401 petition.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). For the following reasons, we grant OSAD’s motion and affirm the trial court's dismissal of defendant's petition.

¶ 3 I. BACKGROUND

¶ 4 In January 1989, defendant pleaded guilty to robbery (Ill. Rev. Stat. 1987, ch. 38, par. 18-1(a)) in Sangamon County case No. 87-CF-588 and was sentenced to three years' imprisonment. Defendant filed a motion to withdraw his guilty plea and to reduce sentence. The trial court denied his motion to withdraw his plea but resentenced defendant to six months in jail.

¶ 5 In September 1989, a jury found defendant guilty of attempt (arson) (Ill. Rev. Stat. 1987, ch. 38, pars. 8-4, 20-1) in Sangamon County case No. 88-CF-182. On November 20, 1989, the trial court sentenced defendant to two years' imprisonment. Defendant appealed, arguing (1) the evidence presented was insufficient to convict him of the charged crime, (2) the trial court erred in giving the jury the "*Prim*" instruction over his objection, and (3) he was entitled to additional sentence and monetary credit. On June 29, 1990, this court affirmed defendant's conviction but remanded the cause to allow the additional credit. *People v. Robinson*, No. 4-89-0900 (June 29, 1990) (unpublished order under Supreme Court Rule 23).

¶ 6 In September and October 1997, defendant *pro se* filed multiple postconviction petitions alleging his trial counsel provided ineffective assistance for failing to contact witnesses in case No. 88-CF-182. The trial court denied defendant's postconviction petitions. Defendant appealed, and OSAD was appointed to represent him. OSAD filed a motion to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967), arguing no meritorious issue could be raised. On October 14, 1998, this court granted OSAD's motion to withdraw and affirmed the trial court's dismissal. *People v. Robinson*, Nos. 4-97-1029, 4-97-1030 cons. (October 14, 1998) (unpublished order under Supreme Court Rule 23).

¶ 7 On January 7, 2010, defendant filed a section 2-1401 petition for relief from judgment in case Nos. 87-CF-588 and 88-CF-182, alleging (1) he "should not have been convicted of attempted arson—he should have been convicted of criminal damage to property, if anything" because the information was deficient and (2) although his trial counsel knew he suffered mental-health issues at the time of his conviction, counsel failed to bring it to the trial

court's attention.

¶ 8 On March 25, 2010, the State filed a motion to dismiss defendant's petition.

¶ 9 On May 12, 2010, defendant filed a "motion to supplement/amend," which stated his original petition was *incorrect* in asserting his trial counsel and the trial court were aware of his mental-health issues at the time of trial. It is unclear from the record whether the trial court ruled on this motion.

¶ 10 On June 8, 2010, the trial court granted the State's motion to dismiss the petition.

The June 8 docket entry shows the following:

"Phone conference held on [May 20, 2010,] with [the State] and [defendant]. After taking the matter under advisement, the Court grants [the State's] Motion to Dismiss the Petition for Relief. The Petition was filed at least twenty years after judgment was entered in these cases. [Defendant,] in his petition for relief, makes a number of claims[,] including [defendant] had mental-health issues, the information filed against him in the attempted arson case was deficient[,] and the trial counsel was ineffective in not asking for a fitness hearing \*\*\*. The Court finds the Petition alleges no errors of fact unknown to [defendant] and the Court which would have prevented judgment from being entered in these cases. The issues raised by [defendant] may have been appropriate for Appeal or Post-Conviction Petitions, but the time has run for those actions to be filed. The Petition is dismissed and the cause is stricken."

¶ 11 On July 28, 2010, defendant *pro se* filed a "leave to file notice of appeal," which this court allowed on October 13, 2010. Thereafter, OSAD was appointed to represent defendant.

¶ 12 On May 27, 2011, OSAD filed a motion to withdraw as counsel from defendant's appeal in case No. 88-CF-182, asserting no issues of arguable merit could be raised on appeal. The record shows service of the motion on defendant. On our own motion, we granted defendant leave to file additional points and authorities by July 4, 2011. Defendant filed none. After examining the record consistent with our responsibilities under *Finley*, we grant OSAD's motion to withdraw as counsel on appeal and affirm the trial court's judgment.

¶ 13 II. ANALYSIS

¶ 14 OSAD argues no meritorious issue can be raised and an appeal from the trial court's dismissal of defendant's section 2-1401 petition would be frivolous. We agree.

¶ 15 Defendant's *pro se* section 2-1401 petition alleged (1) the instrument charging him with attempt (arson) was deficient and (2) his trial counsel provided ineffective assistance by failing to bring defendant's mental-health issues to the attention of the trial court.

¶ 16 "Section 2-1401 of the Code of Civil Procedure \*\*\* provides a comprehensive statutory procedure by which final orders and judgments may be challenged more than 30 days after their entry." *People v. Pinkonsly*, 207 Ill. 2d 555, 562, 802 N.E.2d 236, 241 (2003). "Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *People v. Vincent*, 226 Ill. 2d 1, 7-8, 871 N.E.2d 17, 22 (2007). "[A] section 2-1401 petition \*\*\* requires the court to

determine whether facts exist that were unknown to the court at the time of trial and would have prevented entry of the judgment." *Pinkonsly*, 207 Ill. 2d at 566, 802 N.E.2d at 243.

¶ 17 A section 2-1401 petition is "not designed to provide general review of all trial errors nor to substitute for direct appeal." *People v. Haynes*, 192 Ill. 2d 437, 461, 737 N.E.2d 169, 182 (2000) (quoting *People v. Berland*, 74 Ill. 2d 286, 314, 385 N.E.2d 649, 662 (1978)). "Issues which could have been raised in a motion for rehearing or on direct appeal are *res judicata* and may not be relitigated in [a] section 2-1401 proceeding." *In re Marriage of Baumgartner*, 226 Ill. App. 3d 790, 794, 590 N.E.2d 89, 92 (1992). The denial of a petition seeking relief from judgment under section 2-1401 is subject to *de novo* review. *Vincent*, 226 Ill. 2d at 14, 871 N.E.2d at 26.

¶ 18 While defendant's petition alleges the information charging him with attempt (arson) was deficient, a section 2-1401 petition is not the proper petition for such a claim. A section 2-1401 petition is a "forum in a criminal case in which to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time of trial, which, if then known, would have prevented the judgment." *People v. Johnson*, 352 Ill. App. 3d 442, 444, 816 N.E.2d 636, 638 (2004). In this case, defendant's petition does not make a factual argument. Instead, the petition sets forth a legal argument, *i.e.*, the charging instrument was deficient. Questions of law are not properly raised in a section 2-1401 petition. See *Haynes*, 192 Ill. 2d at 461, 737 N.E.2d at 182. Further, this issue could have been raised either on direct appeal or in defendant's postconviction petition.

¶ 19 Defendant's petition also alleges his trial counsel was ineffective by failing to alert the trial court of defendant's mental-health issues. However, the supreme court has held "section

2-1401 proceedings are not an appropriate forum for ineffective-assistance claims because such claims do not challenge the factual basis for the judgment." *Pinkonsly*, 207 Ill. 2d at 567, 802 N.E.2d at 244.

¶ 20 Moreover, the only evidence contained in the record to support defendant's allegation relates to (1) a 1996 fitness-to-stand-trial evaluation, and (2) a January 17, 1997, order finding defendant unfit to stand trial in Sangamon County case No. 95-CF-529 because of a mental-health condition. OSAD argues the 1996 evaluation has no bearing on defendant's 1989 conviction for section 2-1401 purposes. We agree. A mental-illness diagnosis *after* the defendant's conviction does not provide a proper basis for section 2-1401 relief. See *Haynes*, 192 Ill. 2d at 463, 737 N.E.2d at 184. Further, because the evaluation was not in existence at the time of defendant's conviction, the allegation raised in the petition does not amount to newly discovered evidence existing at the time of trial, which if known to the court could have affected the outcome of the case. See *Pinkonsly*, 207 Ill. 2d at 566, 802 N.E.2d at 243.

¶ 21 The trial court did not err in denying defendant's section 2-1401 petition. Because any appeal in this cause would be frivolous, OSAD is granted leave to withdraw as counsel.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 24 Affirmed.